Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Emergency Petition for	)	**WC Docket No. 04-245**
Declaratory Ruling and Preemption	)	
of State Action	)	
	)	

REPLY COMMENTS OF MCI, INC.

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Pursuant to Section 1.415 of the Commission's Rules, MCI, Inc. ("MCI") respectfully submits these Reply Comments in response to the initial comments filed in the above-captioned matter.[1]

MCI responds to the initial comments as follows:

- Section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act"), standing alone, confers jurisdiction only on the FCC to enforce continuing compliance with Section 271.[2]

- Although Section 271, standing alone, does not confer jurisdiction or enforcement authority on state commissions, state commissions do have limited authority under Section 252(b) of the Act to arbitrate terms and conditions for network elements that ILECs are not required to provide pursuant to Sections 251 and 252 of the Act, but only to the extent that parties voluntarily negotiate those issues pursuant to Section 252(a).[3]

- Nothing in the Act preempts state commissions from regulating rates, terms, and conditions for network elements (even elements identical to Section 271 elements) if the state commissions have authority to so regulate pursuant to their respective state laws or other sources.

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[1] Public Notice, *Pleading Cycle Established for Comments on BellSouth's Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245, 19 FCC Rcd 12320 (2004) *("Public Notice").*

[2] 47 U.S.C. § 271.

[3] 47 U.S.C. §§ 251 and 252.

- MCI does not take a position on whether the Tennessee Regulatory Authority ("TRA") properly asserted jurisdiction over the non-251/252 switching element in the underlying matter between BellSouth and ITC^DeltaCom because the matter involves a disputed issue of fact as to whether they voluntarily negotiated a rate for non-251/252 switching in the context of a Section 252 negotiation. However, if BellSouth and ITC^DeltaCom indeed did voluntarily negotiate a rate for non-251/252 switching in the context of a Section 252 negotiation, the TRA would unquestionably have jurisdiction to arbitrate the issue pursuant to Section 252(b).

I. INTRODUCTION AND SUMMARY

The initial comments filed in response to BellSouth's Emergency Petition for Declaratory Ruling and Preemption of State Action ("Petition")[4] cleave consistently between the RBOCs on one side and the CLECs and state entities on the other.[5] The RBOCs argue that Section 271 absolutely preempts state commissions from regulating unbundled network elements provided solely pursuant to Section 271 and not required to be provided by Sections 251 and 252 ("Section 271 Elements").[6] Conversely, the CLECs and state entities generally argue that state commissions have broad authority to regulate such elements,

[4] BellSouth's Emergency Petition for Declaratory Ruling and Preemption of State Action, WC Docket No. 04-245 (filed July 1, 2004) ("BellSouth Petition").

[5] MCI did not file initial comments.

[6] Comments of Verizon at 4-9; Comments of SBC Communications Inc. in Support of BellSouth's Petition at 2-4; Comments of Qwest Corporation at 2.

Section 271(c)(2)(B) specifically requires that the RBOCs, as a condition for providing in-region interLATA service, provide, among other things, local loops, local transport, and local switching as unbundled network elements. Because the Commission has consistently found that CLECs are impaired without unbundled access to these and other elements, the RBOCs and all other ILECs have been required to provide them pursuant to Section 251(c)(3). Prior to the *Triennial Review Order*, there had been no situation in which there was an element that was required to be provided pursuant to Section 271 but not Section 251. However, although the *Triennial Review Order,* in provisions that have since been vacated and remanded, found that CLECs are impaired on a national basis without unbundled access to mass market switching, local loops, and local transport, the *Triennial Review Order* also held that CLECs are not impaired without access to enterprise local switching. Enterprise switching thus is an example of a "Section 271 Element" – one that must be unbundled as a condition of Section 271, but is not required to be unbundled pursuant to Section 251(c)(3).

including authority derived from Section 271.[7] In these Reply Comments, MCI takes a view that places it between those positions.

MCI contends that Section 271, standing alone, provides jurisdiction over Section 271 Elements only to the FCC. Only the FCC can enforce Section 271. However, the Act does not preempt state commissions from regulating network elements, including those that are identical to Section 271 Elements, pursuant to applicable state law or other sources.

State commissions also have explicit authority to arbitrate terms and conditions for network elements that were the subject of voluntary negotiations pursuant to Section 252, regardless of whether the ILEC provides those elements pursuant to Sections 251, 252, 271, or otherwise. As the United States Court of Appeals for the Fifth Circuit explained in *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Company*:

> There is nothing in § 252(b)(1) limiting open issues only to those listed in § 251(b) and (c). By including an open-ended voluntary negotiations provision in § 252(a)(1), Congress clearly contemplated that the sophisticated telecommunications carriers subject to the Act might choose to include other issues in their voluntary negotiations, and to link issues of reciprocal interconnection together under the § 252 framework. . . . . Congress contemplated that voluntary negotiations might include issues other than those listed in § 251(b) and (c) and still provided that *any issue* left open after unsuccessful negotiation would be subject to arbitration by the [state commission].[8]

MCI's position provides a legally sound, balanced, and fair interpretation of a complex and sometimes troublesome statutory scheme. MCI adheres to the actual language of Section 271 and does not

[7] *See, e.g.*, Comments of the Association for Local Telecommunications Services at 2-7; Opposition of The Pace Coalition, Competitive Carriers of the South, Talk America, and CompTel/Ascent at 5-9; Opposition of ITC^DeltaCom Communications, Inc. at 7-10; Comments of AT&T Corp. at 12-13; Opposition of the National Association of Regulatory Utility Commissioners at 3-5; Opposition of the Tennessee Regulatory Authority to BellSouth's Emergency Petition at 12-17.

[8] *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482, 487 (5th Cir. 2003) (emphasis in original).

read unwritten provisions or implications into it. At the same time, MCI preserves the highly important role that state commissions continue to play in telecommunications competition policy by recognizing state authority to regulate, pursuant to non-271 federal or state law, the provision of Section 271 Elements. RBOC efforts to read preemptive language into Section 271 so as to entirely remove state commissions from the process are not supported by law or sound public policy.

With respect to the TRA proceeding underlying BellSouth's Petition, MCI does not take a position on the ultimate question of whether the TRA acted within its authority because, in addition to the broader legal questions, the underlying dispute between BellSouth and ITC^DeltaCom turns on a factual dispute as to whether they voluntarily negotiated a rate for non-251/252 switching in the context of a Section 252 voluntary negotiation. If, in fact, the rate was the subject of Section 252 voluntary negotiations, the TRA would unquestionably have authority to arbitrate the issue.

II. SECTION 271, STANDING ALONE, PROVIDES JURISDICTION ONLY TO THE FCC TO REGULATE SECTION 271 UNBUNDLED NETWORK ELEMENTS

In its Petition, BellSouth argues that Section 271 provides no role for state commissions except for consultative duties during the initial Section 271 application approval process.[9] The other RBOCs echoed this assertion.[10] The CLECs and state entities, in contrast, generally contended that Section 271, operating through the procedural provisions of Section 252, is a source of state authority over Section 271 Elements.[11]

[9] BellSouth Petition at 6-8.

[10] Comments of Verizon at 4-9; Comments of SBC Communications Inc. in Support of BellSouth's Petition at 2-4; Comments of Qwest Corporation at 2.

[11] *See, e.g.*, Comments of the Association for Local Telecommunications Services at 2-7; Opposition of The Pace Coalition, Competitive Carriers of the South, Talk America, and CompTel/Ascent at 5-9; Opposition of ITC^DeltaCom Communications, Inc. at 7-10; Comments of AT&T Corp. at 12-13; Opposition of the National Association of Regulatory Utility Commissioners at 3-5; Opposition of the Tennessee Regulatory Authority to BellSouth's Emergency Petition at 12-17.

The plain language of Section 271 demonstrates that, standing alone, the statute provides jurisdiction to regulate Section 271 Elements only to the FCC. The FCC's jurisdiction is established beginning with the initial application stage for in-region interLATA authority, for which Section 271(d)(1) provides that RBOCs seeking authority to provide in-region interLATA services must "apply to the Commission for authorization." Pursuant to Sections 271(d)(2) and (3), upon receiving an application, the FCC shall consult with the Attorney General and the applicable state commission, and then "issue a written determination approving or denying the authorization requested in the application for each State." For on-going compliance with the conditions required for RBOC entry into the interLATA market, including adherence to the network element requirements set forth in Section 271(c)(2)(B) (the competitive checklist), Section 271(d)(6) provides the FCC with enforcement authority. Specifically, Section 271(d)(6) reads:

> If at any time after the approval of an application under paragraph (3), *the Commission* determines that a Bell operating company has ceased to meet any of the conditions required for such approval, *the Commission* may, after notice and opportunity for a hearing -
>
> (i) issue an order to such company to correct the deficiency;
>
> (ii) impose a penalty on such company pursuant to subchapter V of this chapter; or
>
> (iii) suspend or revoke such approval.
>
> (Emphasis added.)

Conversely, Section 271 contains no comparable provision of authority to state commissions to implement or enforce its provisions. Rather, as noted above, Section 271(d)(2)(B) provides only that when an RBOC is petitioning for interLATA authority, the FCC shall "consult" with the commission of the state for which the RBOC is making the petition. This consultative function proved extraordinarily valuable

during the Section 271 approval process, but that initial application stage is past.[12] Section 271 contemplates no further role for the states in the enforcement of the RBOCs continued compliance with the statute.

The FCC's Section 271(d)(6) enforcement authority empowers the FCC (and only the FCC) to hear complaints that allege that an RBOC has ceased to meet any of the conditions required for approval of the RBOC's petition to provide in-region interLATA service. As the FCC has repeatedly made clear, the rates at which the RBOC provides unbundled network elements are relevant to the FCC's consideration of the RBOCs' continued compliance with Section 271.[13] Because prior to the *Triennial Review Order* all of the network elements required to be unbundled by Section 271 also were required to be unbundled by Section 251, the operative pricing standard for any such elements was the FCC's Total Element Long-Run Incremental Cost ("TELRIC") standard. However, the FCC has determined that if elements required to be unbundled pursuant to Section 271 are removed from the list of Section 251 network elements, the standard will shift away from TELRIC. Rather, as set forth in the *Triennial Review Order*, "the appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202."[14]

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[12] *See SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998) ("Congress has clearly charged the FCC, and not the State commissions, with deciding the merits of BOCs' requests for interLATA authorization.").

[13] *See*, *e.g.*, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, ¶652 (2003) *("Triennial Review Order").*

[14] *Triennial Review Order* at ¶656 (citation omitted). Also in the *Triennial Review Order*, the FCC reiterated and confirmed its finding in the UNE Remand proceeding that "[i]f a checklist network element does not satisfy the unbundling standards in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a)." *Triennial Review Order* at ¶ 662.

The FCC has made clear that it will review whether rates for Section 271 Elements continue to satisfy the standards of Sections 201 and 202 through enforcement proceedings brought pursuant to Section 271(d)(6).[15] This review authority encompasses complaints raised in a number of different contexts, including situations where an RBOC attempts to modify an existing interconnection agreement and those where the RBOC and CLEC are forming a new agreement outside of Section 252.

III. STATE COMMISSIONS HAVE AUTHORITY TO ARBITRATE RATES, TERMS, AND CONDITIONS FOR SECTION 271 UNBUNDLED NETWORK ELEMENTS ONLY IF THE PARTIES VOLUNTARILY NEGOTIATED THOSE TERMS AND CONDITIONS PURSUANT TO SECTION 252

Unless and until Section 271 Elements are the subject of voluntary negotiations pursuant to Section 252, the Act does not grant state commissions authority to arbitrate the rates, terms, and conditions for Section 271 Elements. However, as several CLECs commented,[18] in instances where the parties have voluntarily included in Section 252(a) negotiations issues other than those duties required of an ILEC by Section 251(b) and (c), those issues are subject to compulsory arbitration under Section 252(b)(1).[19] Either party can petition for arbitration of any of the issues. The key determining factor is the nature of the negotiations

[15] *Triennial Review Order* at ¶664.

[18] Comments of Z-Tel, Inc. at 11-12; Opposition of ITC^DeltaCom Communications, Inc. at 5-6; Comments of US LEC Corp. to BellSouth Telecommunications, Inc. Emergency Petition for Declaratory Ruling and Preemption of State Actions at 2-3; Opposition of The Pace Coalition, Competitive Carriers of the South, Talk America, and CompTel/Ascent at 5-9.

[19] *See Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482, 487 (5th Cir. 2003).

between the parties. In this situation, only those issues that were voluntarily negotiated in the context of a Section 252(a) negotiation are eligible for arbitration by state commissions.

Once faced with a petition for arbitration, the state commission is required by Section 252(b)(4) to resolve any open issue submitted for arbitration, regardless of whether the issues are limited to Section 251 obligations. The language in Section 252(b)(4)(C) is very clear that "[t]he state commission *shall* resolve each issue set forth in the petition and the response. . . ."[20] To be sure, in *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Company*,[21] the United States Court of Appeals for the Fifth Circuit declared that "[t]here is nothing limiting open issues to those listed in Section 251(b) and (c)."[22] The court further held that the state commission's jurisdiction "to arbitrate 'any open issues,' is not limited by the terms of the Act provisions setting forth the ILEC's duties, but, instead, is limited by the actions of the parties in conducting voluntary negotiations."[23] Nothing in the Act limits open issues that state commissions can arbitrate to those listed in Section 251(b) and (c). Thus, to the extent that parties voluntarily negotiate issues regarding an RBOC's 271 obligations in the context of Section 252(a) negotiations, any unresolved issue is subject to arbitration by state commissions pursuant to Section 252(b).

IV. NOTHING IN THE ACT CAN BE READ TO PREEMPT OR PRECLUDE STATES FROM EXERCISING INDEPENDENT JURISDICTION UNDER STATE LAW OR OTHER AVAILABLE SOURCES TO REGULATE TELECOMMUNICATIONS SERVICES

MCI disagrees with the claim by BellSouth and other RBOCs that state commissions have absolutely no jurisdiction to regulate Section 271 Elements.[24] In addition to arbitrating issues voluntarily negotiated by

[20] 47 U.S.C. § 252(b)(4)(C) (emphasis added).

[21] *Coserv*, 350 F.3d at 484.

[22] *Id.* at 487.

[23] *Id.*

[24] BellSouth Petition at 6-8; Comments of Verizon at 9-13.

the parties pursuant to Section 252, states may still be able to regulate elements that are not required to be unbundled pursuant to Section 251, even if they are not negotiated pursuant to Section 252, by relying on state law or other sources that grant state commissions authority to regulate telecommunications services.

While the Act does not expressly confer jurisdiction or authority on state commissions, neither does it expressly preempt or preclude state commissions from regulating terms and conditions for network elements provided pursuant to Section 271 if a state commission has authority to do so pursuant to state law or some other source. For example, as AT&T points out, "states can rely on state law to establish terms for checklist items in interconnection agreements."[25] A straightforward reading of the Act does not support the RBOC position that state jurisdiction is totally barred by federal law. Their attempts to extrapolate preemptive language from the Act in order to entirely remove the states from the process are not supported by either the plain terms of the statute or sound policy.

Nowhere does the Act provide the FCC with "sweeping exclusive jurisdiction over each particular rate, term and condition for all of the checklist items."[26] MCI agrees with AT&T that, given the many state law savings clauses in the Act, such as Sections 252(e)(3), 253(d) and 601(c), it would be irrational to read the Act as completely divesting states of their jurisdiction over telecommunications services. State commissions can and should continue to play an important role in telecommunications competition policy, including the authority to regulate RBOC provision of non-251/252 elements, pursuant to state law or other sources.

[25] Comments of AT&T Corp. at 18.

[26] Comments of AT&T Corp. at 6.

V. THE FCC SHOULD REQUIRE THE RBOCS TO SUPPORT RATES FOR SECTION 271 ELEMENTS

As MCI discussed above, the FCC has exclusive jurisdiction to implement and enforce Section 271. Because the RBOCs have already received Section 271 authorizations nationwide, the FCC's review of rates for any Section 271 Elements will most likely be undertaken in the context of formal complaints filed pursuant to Section 271(d)(6).[27] Under this section, the FCC has enforcement authority where an RBOC has ceased to meet the conditions of its Section 271 approval.

In its *Triennial Review Order*, the FCC made expressly clear that the question of whether or not a rate for a Section 271 Element is just and reasonable is a *fact-specific inquiry,*

> Whether a particular checklist element's rates satisfies the just and reasonable pricing standard of Sections 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6).[28]

The necessity that any examination of rates under Sections 201 and 202 must be fact-specific is of critical importance. Rates for Section 271 Elements cannot be arbitrary or derived randomly with no factual basis. Rather, such rates must be based on specific factual evidence. The FCC has ample ratemaking experience pursuant to Sections 201 and 202 and should ensure that any rates it approves for Section 271 Elements are subjected to rigorous review. Although TELRIC will no longer be the pricing standard, rates for Section 271 Elements must be established in a manner consistent with the FCC's past application of Sections 201 and 202 and cannot be without factual basis.

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[27] The Commission could require the RBOCs to submit tariff filings for their Section 271 offerings. With respect to the pricing of such elements, the tariff filings would need to contain supporting cost data. CLECs would then have the opportunity to petition to reject, suspend, and investigate the tariff filings if the proposed rates appear to violate the just, reasonable, and nondiscriminatory standard of Sections 201 and 202.

[28] *Triennial Review Order* at ¶664.

Thus, the FCC should clearly state that RBOCs will be expected to justify their rates in the context of complaint proceedings. If a CLEC challenges the rates, terms, or conditions of an RBOC's Section 271 offering pursuant to Section 271(d)(6), alleging that the RBOC has failed to maintain compliance with its Section 271 authority, the FCC must not validate such rates unless the RBOC clearly demonstrates with factual evidence that its rates meet the standards set forth in Sections 201 and 202.

VI. MCI DOES NOT TAKE A POSITION ON WHETHER THE TRA PROPERLY ASSUMED JURISDICTION OVER THE NON-251/252 SWITCHING ELEMENT IN THE UNDERLYING PROCEEDING

A determination of whether the TRA properly assumed jurisdiction over the non-251/252 switching element in the proceeding underlying this case depends on both legal and factual issues. To that end, a primary factual issue is whether BellSouth and ITC^DeltaCom voluntarily negotiated a rate for the element in the context of a Section 252 negotiation. Reaching a conclusion on that factual issue (and possibly others) requires a close examination of the facts of the case, and the record appears to be extensive. However, the FCC does not need to determine whether the TRA properly assumed jurisdiction in this particular case for purposes of ruling on the broadly applicable legal issues concerning the extent of state commissions' jurisdiction and authority to regulate non-251/252 network elements. Thus, MCI does not take a position on whether the TRA properly asserted jurisdiction over the non-251/252 switching element in the underlying proceeding.

MCI notes, however, that if BellSouth and ITC^DeltaCom voluntarily negotiated a rate in the context of a Section 252 negotiation, then the TRA properly assumed jurisdiction. As discussed above, a state commission presented with a petition for arbitration following a Section 252 negotiation is required by Section 252(b)(4) to resolve any open issue submitted for arbitration, regardless of whether the issues are limited to Section 251 unbundling obligations. That point was confirmed by the United States Court of

Appeals for the Fifth Circuit in *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Company*, in which the court held that "Congress contemplated that voluntary negotiations might include issues other than those listed in § 251(b) and (c) and still provided that *any issue* left open after unsuccessful negotiation would be subject to arbitration by the [state commission]."[29]

VII. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, MCI respectfully asks the Commission to act in the public interest in accordance with the proposals set forth herein.

Respectfully submitted,

/s/ John R. Delmore

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[29] *Coserv*, 350 F.3d at 487 (emphasis in original).

CERTIFICATE OF SERVICE

I, Michelle Lopez, hereby certify that on this 16th day of August, 2004, copies of the foregoing were served by regular mail or electronic mail on the following:

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